APPENDIX A

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CONSTITUTION OF THE UNITED STATES OF AMERICA

RIGHTS OF PERSONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 40—UNITED STATES CODE

258a. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the

value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

258b. No appeal in any cause under section 258 of this title nor any bond of undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

258c. Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

258d. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 258a of this title shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such

proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

258e. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 255 of this title: *Provided*, that in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

258f. In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise.

Public Law 86-220
86th Congress, H. R. 4329
September 1, 1959
73 Stat. 451

AN ACT

To provide for the conveyance to any public or private organization of the State of Virginia of certain dwellings acquired in connection with the Chantilly airport site, Virginia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the frame and brick dwellings known respectively as Sully and Leeton, located on the former Sully Plantation near Chantilly in Fairfax County, Virginia, acquired by the United States pursuant to the Act of September 7, 1950 (64 Stat. 770), shall not be demolished by any agency of the United States prior to December 31, 1959. Upon request therefore prior to December 31, 1959, the Administrator of the Federal Aviation Agency is authorized—

Sully Plantation.
Chantilly, Va.
Preservation and conveyance.
D.C. Code 7-1401 to 7-1412.

(a) to convey to any public or private organization of the State of Virginia, without cost, title to the buildings known as Sully and to grant an easement for use of such land as the Administrator considers necessary for maintenance of such buildings for historic purposes; provided that any such conveyance and easement shall be conditioned upon (1) continued preservation, maintenance and exhibition of such buildings for historic purposes, (2) a covenant not to use the property as a place of public assembly, (3) a covenant not to use the property for commercial purposes and (4) such other conditions as the Administrator considers necessary to protect the interests of the United

States; and upon a provision that if such conditions are not complied with the title to such buildings shall revert to the United States and such easement shall terminate; and* 73 STAT. 451 | 73 STAT. 452.

(b) to grant a right to any applicant to which a conveyance is made pursuant to paragraph (a) hereof, without cost, to dismantle the buildings known as Leeton, and to salvage and remove any and all material considered by such grantee to have a historic value; provided that the grant of such right shall be conditioned upon an obligation of the grantee to remove all material and structures, whether or not of historic value, from the land occupied by such buildings and to restore the land to a condition satisfactory to the Administrator, including, but not limited to, the removal of all debris and the filling of all wells and basement and septic tank excavations. Leeton buildings. Dismantling and salvage.

Approved September 1, 1959.

In the United States Court of Claims

No. 218-60

(Decided March 1, 1961)

LEWIS S. AND JEAN S. TRAVIS v. THE UNITED STATES

Ernest N. Hudgins for the plaintiffs.

Howard O. Sigmond with whom was *Assistant Attorney General Perry W. Morton*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:

This is an action to recover for the taking of real property without just compensation. The plaintiffs have been awarded compensation by the United States District Court for the Eastern District of Virginia based on the value of the land on September 11, 1958, the date of the filing of a declaration of taking by the defendant. But they allege that the taking really occurred on February 1, 1960, by which date the value of the property had increased considerably because the area had been rezoned by county authorities.

In 1950, the Congress authorized the construction, development and operation of a public airport to service the National Capital area. The site chosen for the so-called Dulles International Airport is in Fairfax County, Virginia, near the town of Chantilly. In January 1958, the United States instituted an action in the district court to acquire fee simple title to those lands in Fairfax and Loudoun Coun-

ties which were deemed necessary for the airport development. The complaint relied for the taking on the authority of the act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257; the act of September 7, 1950, 64 Stat. 770; and the Supplemental Appropriation Act approved August 28, 1957, 71 Stat. 426. Also in January 1958, the district court entered an order granting the United States possession of the lands which were the subject of the condemnation action. The plaintiffs, as defendants in that suit, filed an answer denying that the taking was for a valid public purpose and asserting that the two parcels of land which they owned were not susceptible of a taking for the purposes set forth in the Government's complaint.

The parcels of land owned by plaintiffs at the time the condemnation action was commenced were within the proposed exterior boundaries of the airport. Situated thereon was a house known as "Leeton" built by an uncle of Robert E. Lee in the early days of the Republic and of some historic interest. Although the exterior was authentic, the interior was of fairly recent construction. Nearby, but on other lands, another house of historic interest known as "Sully" was located.

The district court vacated its original order of possession in July 1958 and made the right of the United States to take possession contingent on the filing of a declaration of taking. This the United States did on September 11, 1958, at the same time depositing with the court the estimated just compensation for the lands taken. The value of plaintiffs' lands was estimated at $75,000 and this amount was later withdrawn from the court by them. Declaration of Taking No. 15 cited the statutes relied on in the complaint and other statutes including the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a.

The trial of the condemnation suit as it applied to these

plaintiffs was set for April 1960. However, on September 1, 1959, the first sesson of the 86th Congress approved Public Law 86-220, 73 Stat. 451, which was based on the premise that title to the parcels of land previously owned by the plaintiffs had devolved to the United States and which gave the United States the power to designate any public or private corporation in Virginia as the proper agency to dismantle "Leeton" and to preserve "Sully", it having been decided that "Sully" was an appropriate site for preservation but that "Leeton" was not. Accordingly, the Fairfax County Park Authority was designated as the qualified organization to acquire the buildings and to conduct the preservation, salvage, and removal operations. On February 1, 1960, the park authority assumed physical control of "Leeton" and began razing the building. On April 26, 1960, the court-appointed commissioners filed their valuation report advising that the total fair value of plaintiffs' parcels of land and improvements was $79,250, or $4,250 more than the amount deposited by the United States at the time of the filing of the declaration of taking. It appears that at the time set for trial in the district court the proceedings were restricted to an inquiry into the amount of compensation. It further appears that if there were genuine issues created by the complaint and answer in the action in the district court, no final judgment thereon has been rendered.

The petition asks us to determine that the taking of the two parcels of land did not occur until February 1, 1960, when the defendant's designees physically entered upon the premises. To so hold we would have to decide that the condemnation proceedings, including the declaration of taking, were invalid and ineffective to confer title on the United States. Such a holding would contain the implicit determination that the act of Congress of September 1, 1959, is a nullity because it authorized the United States to dispose of something which it did not own.

Plaintiffs compute the value of the lands involved, zoned for industrial purposes on February 1, 1960, at a figure in excess of $3 million. They also include in their damages prayer the value of "Leeton" which, of course, no longer exists. If the position of the defendant, namely that the United States acquired title to plaintiffs' lands by virtue of the declaration of taking of September 11, 1959, is correct, then the matter of just compensation can be, and apparently has been settled in the district court.

The defendant's position is based on the Declaration of Taking Act, *supra*. The text of the act is set forth in the margin [1] and provides, in substance, that in any condemnation action, the Government may, contemporaneously with the filing of the petition or any time prior to judgment, file a declaration of taking covering the lands described in the petition. The declaration must contain certain prescribed statements and descriptions and if, at the time the declaration is filed the United States deposits the estimated compensation for the lands with the court, title in fee simple absolute or some lesser estate, if requested, will then vest in the United States. At the same time, the right to immediately receive the estimated compensation vests in the landowner.

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[1] Title 40 U.S.C.:

§ 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure.

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

It has been repeatedly held that under the statute title to the realty vests in the United States immediately upon the filing of a declaration of taking and the payment into the court of the estimated compensation. *U.S.* v. *Hayes*, 172 F. 2d 677 (2d Cir. 1949); *U.S.* v. *150.29 Acres of Land, More or Less, in Milwaukee County, Wis., et al.*, 135 F. 2d. 878 (7th Cir. 1943); *U.S.* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (7th Cir. 1942). It has also been held that the Act does not work an unconstitutional deprivation of property without due process since it provides for the payment of just compensation. *City of Oakland* v. *U.S.*, 124 F. 2d 959 (9th Cir. 1942); *U.S.* v. *47.21 Acres of Land, Parcel No. 5, et al.*, 48 F. Supp. 73 (1943); *U.S.* v. *Eighty Acres of Land in Williamson County, Ill., et al.*, 26 F. Supp. 315 (1939).

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(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compenation (*sic*) stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith

In their briefs, the plaintiffs have outlined the theory they intended to advance in their defense of the condemnation action in district court, which, they say, if found to be correct would result in a judgment in their favor. They say that if the district court action had gone to judgment in their favor, the declaration of taking would fail. We do not pass on the validity of the plaintiffs' defense to the condemnation suit. But it is perhaps worth noting that there is no clear agreement on what would be the effect on a previously filed declaration of taking, of a failure of the condemnation suit, in the courts which have commented on this point. Under the facts in *U.S.* v. *Carey et al.*, 143 F. 2d 445 (9th Cir. 1944), it was held that the dismissal of the condemnation petition would not result in a divesting of the title acquired by the United States as a result of a declaration of taking. The suggestion was made by the court in *U.S.* v. *12,918.28 Acres of Land in Webster Parish, La., et al.*, 50 F. Supp. 712 (1943), that the United States could be divested of title acquired through a declaration of taking only by appropriate congressional action It has been held that judgment entered on a declaration of taking cannot be vacated and that the court has no power to strike the declaration itself in the absence of bad faith. *In Re United States*, 257 F. 2d 844 (5th Cir. 1958); *U.S.* v. *44.00 Acres of Land, More or Less, Situate in the Town*

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for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

of Greece, County of Monroe, 234 F. 2d 410 (2nd Cir. 1956) cert. den. 352 U.S. 916; *U.S.* v. *Hayes*, *supra*.

On the other hand, it has been suggested that when the condemnation proceedings fail for lack of a valid statutory authority, the declaration of taking fails with it. We are not prepared to say that this is a correct statement of the law since we have been unable to locate any case in which a declaration of taking was nullified as a result of the Government's failure to prevail in its condemnation suit. In any event, whether the condemnation action has gone to judgment in the landowners' favor, thus perhaps nullifying the declaration of taking, seems to us to be a question peculiarly within the province of the district court. Our understanding is that the plaintiffs, dissatisfied because the district court proceedings were restricted to the question of just compensation, have refused to withdraw from the court the additional compensation awarded. Hence, no final judgment has been entered in the district court; certainly no judgment has been entered determining the condemnation action to be invalid because of an excessive or unauthorized taking. In the absence of any such judgment, the basic premise for plaintiffs' challenge to vesting of title in the United States through the declaration of taking dissolves.

The same parties who are before us in this action, the petition in which raises the questions if and when the Government could acquire the Travis property, were before the United States District Court in an action involving essentially the same considerations. The plaintiffs in this action claim to have there raised the question of the validly of the condemnation, one phase of which was the declaration of taking. Any answer to a condemnation complaint must conform to the provisions of Rule 71A of the Federal Rules of Civil Procedure. Whether the Travises have satisfied this requirement is again a matter peculiarly for

the determination of the district court which had jurisdiction over the parties and the issues.

We perceive no reason why, at the proper juncture, the problems of the sufficiency of the answer and the district court's restriction of the trial to the matter of compensation cannot be presented by plaintiffs to the Court of Appeals. Likewise, had there been a full hearing on the authority of the United States to take plaintiffs' lands which resulted in a clear verdict against the plaintiffs, we think that that matter, too, could be properly presented to the Court of Appeals at the appropriate time.

The plaintiffs have characterized the act of September 1, 1959, which authorized the Fairfax County authorities to take control of the land formerly owned by them, as unconstitutional for a variety of reasons. But this position has as its foundation the premise that the declaration of taking, filed almost one year before passage of the act, did not pass title to the United States. But, as we have noted, the authority is overwhelming for the position that in the absence of a judgment invalidating or modifying a declarition of taking title to the property has vested in the United States as of that moment. If, as the statutory and case law holds, the United States acquired title to the lands at issue on September 11, 1958, with the declaration of taking, then the legislature had the right and power to dispose of them one year later. This of course depends upon the original acquisition having been authorized by law and within proper limits. But, as we have said, there has been neither showing nor determination that this was not the case.

Plaintiffs contest the validity of the 1950 airport authorization, and, presumably, they would have raised the same objections in the district court had they been permitted to do so. Not only was this the proper forum for such an issue, but it is also our understanding that the suit in that court is still under submission and no final decision has been entered.

As we observed at the outset, the plaintiffs' theory of recovery depends upon the invalidity of the declaration of taking which vested title in the United States. They have presented us with no sound reasons why the vesting of title should be invalidated. Moreover, the district court, before which the plaintiffs claim to have put this question in issue, has taken no action to invalidate the declaration. Hence, until and unless the declaration fails, the lands in question are the property of the United States and were correctly considered so in the act of September 1, 1959. Therefore, the taking occurred on September 11, 1958, and the plaintiffs have been awarded full compensation for the taking as of that date. The defendants' motion is granted and that of the plaintiff is denied. Plaintiffs' petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and JONES, *Chief Judge, concur.*

IN THE UNITED STATES COURT OF CLAIMS

LEWIS S. TRAVIS
AND
JEAN S. TRAVIS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendants.

No. 218-60

MOTION FOR RECONSIDERATION

Come now the plaintiffs and respectfully request this Honorable Court to reconsider its decision dismissing plaintiffs' petition, and for grounds therefor state:

This case squarely raises the issue of the effect of the filing of a declaration of taking in a condemnation proceeding where the landowners have defended against the authority of the Taking Agency—where the very validity of the taking is contested.

The Department of Justice has argued that under these circumstances title in fee passes to the United States. (D. br. pp. 11-12; D. rep. br. p.2) This Honorable Court has indicated approval of this assertion. (Opinion of March 1, 1961, pp. 5-6.)

The Plaintiffs must respectfully insist that *when defenses are interposed to the validity of a condemnation proceeding*, the United States obtains no fee simple title by

filing a declaration of taking. *Catlin* v. *United States* (1945) 324 U.S. 229, 241.[1]

It is only when no defense is interposed, i.e. where the authority to take is conceded, that the filing of a declaration of taking in a condemnation proceeding, has the effect of vesting a title in fee simple absolute in the United States. When a citizen defends against the very validity of a taking, a ruling, that, nevertheless, the United States may obtain irrevocable title by the filing, *ex parte*, of a declaration of taking, is in violation of Due Process.

FACTS

Simplified, the facts here are as follows:

The United States brought action to condemn plaintiffs' lands. The Plaintiffs defended in that action, challenging the validity of the taking. The United States then filed a Declaration of Taking. The case was set for trial on a certain date. Prior to this trial, the Congress gave away the very property involved under conditions which rendered it impossible for the landowners, the plaintiffs here, to regain it.

ARGUMENT

WHEN THE UNITED STATES FILED THE ABOVE DECLARATION OF TAKING IT OBTAINED NO PROPERTY RIGHT IN PLAINTIFFS' HOME AND LANDS.

This Honorable Court's attention is directed to the language set forth in the opening paragraph of the Declaration

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[1] It is obvious, of course, that if a declaration of taking has the effect of vesting fee simple title in the United States in all cases, the result will be that no one may ever defend against Federal condemnation, however meritorious his defenses may be. Even if the taking statute itself were held unconstitutional and void the Department of Justice presumably would maintain that where condemnation proceedings had been instituted thereunder, a declaration of

of Taking statute. 40 U.S.C. Sec. 258a. It is provided there that the condemnation proceedings in which declarations of taking may be filed are to be those which are "instituted under the authority" of the United States for acquisition of land for "public use". If a landowner questions either the "authority" or the asserted "public use", then the condition of the statute is not met, and the document should not be filed until the defenses are dismissed for want of merit. This can be done by a successful motion for summary judgment. Here the landowners contested the authority to take (Pl. br. pp. 14-26) and have also shown that the taking was obviously not for "public use". (Pl. br. p. 48.)

The statute is therefore entirely clear. There can be no doubt that the declaration of taking procedure there provided for is to be used only in those cases where no contest is made by landowners as to the authority of validity of the taking—only in those cases where the sole question is the amount of money which should be paid as just compensation.

But confusion has been caused by the practice of the Department of Justice to file declarations of taking in *all* cases whether or not a defense is made by landowners. This unauthorized use of process has been pointed out in several cases, (*City of Oakland* v. *United States*, 124 F. 2d 959, 962-963 [9th Cir.1942]; *Catlin* v. *United States*, *supra*) and by these plaintiffs with varying results. Indeed, in the *Catlin* case, *supra*, 329 U.S. 229, the Supreme Court itself has felt compelled to say that the effect of the filing of this document is "not wholly free from doubt" in cases, such as the one here presented, where the validity of the taking is contested. (329 U.S., at p. 241.)

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taking filed in that case, also, would vest fee title in the United States. This Court's attention is drawn to *Nichols* v. *City of Cleveland*, 247 F. 731 (6th C., 1917) where the Court, on page 740, ruled that the contrary is "too plain for argument".

Assuming then, for purposes of argument, an ambiguously worded statute is before this Honorable Court for interpretation, the following well known canons of construction may be urged to clarify its meaning.

A. Legislative History.

The legislative history of the Declaration of Taking statute shows that it was to be used "solely" in those condemnation cases where the taking agency had "the right to take a piece of property for the public use and the *only* thing that an owner has is the right to just compensation." (Italization supplied.)

This statement was made by Representative Graham who was in charge of presenting the legislation to the House of Representatives.[2]

Thus the legislative history of the statute clearly shows the Congress meant that the declaration of taking should be filed solely in cases where a landowner has conceded the authority to take, has defaulted in answering to the merits, and quarrels only about how such money he should get.

B. Strict Construction in Favor of the Landowner

1. The Declaration of Taking statute is a condemnation statute. Such statutes are, in the absence of any particular legislative mandate to the contrary, always strictly construed in favor of the landowner, and against the United States. *Nichols, Em. Dom.*, 3d Ed. Sec. 24.2(1); *Del., L. & W. R. R.* v. *Morristown* (1928) 276 U.S. 182, 192; *Cincinnati* v. *Vester* (1930) 281 U.S. 439, 448. (The rule is recognized [although not applied, since the statute involved by its very terms required "liberal construction"] in *United States ex rel. T. V. A.* v. *Welch* (1946) 327 U.S. 546, 551). See, also, *U.S.* v. *86.6 Acres* (D. Ct. N.H., 1942) 44 F. Supp. 495, 498;

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[2] For reference to the above legislative history it is not necessary to consult the Congressional Record. The quoted statement is set forth in the margin of the opinion of Moskowitz, District Judge in *United States* v. *Certain Lands*, (E. Dist. N. Y., 1941) 39 F. Supp. p. 91, at the top of the first column of the margin of page 97. Other similar language may be found in the margin on page 94.

U.S. v. 2.4 Acres of Land (7th C., 1943) 138 F. 2d 295, 298.

2. The Declaration of Taking statute is in derogation of common law and should be strictly construed. A condemnation action is one at common law. *Kohl* v. *United States* (1875) 91 U.S. 367, 376. Prior to the enactment of the Declaration of Taking statute the common law rule in condemnation cases was that title did not pass to the United States until final judgment—which determined *all* questions i. e. both the validity of the taking and the amount of compensation. *Luxton* v. *North River Bridge Co.* (1892) 147 U.S. 337, 341; *Ranson Lumber Company* v. *United States* (1923) 261 U.S. 581, 587. The compensation not only had to be ascertained but had to be in fact paid for title to vest in the taker. *Cherokee Nation* v. *Southern Kansas Ry. Co.* (1890) 135 U.S. 641, 659. The Declaration of Taking statute is in derogation of this common law rule.

C. The Construction of a Statute Which Will Support its Constitutionality is the One Which Should be Adopted By The Court

This is indisputable. *United States* v. *Cohen Grocery Co.* (1920) 255 U.S. 81, 92-93. But if in this case, a construction of the Declaration of Taking statute were made that fee simple title passes, such an interpretation "would raise serious question concerning the statute's validity." *Catlin* v. *U.S. supra*, 324 U.S. at p. 241.

In other words the *Catlin* case, *supra*, holds at least one thing. That one holding is as follows:

Where a landowner contests the validity of the condemnation and despite this a declaration of taking is filed, the United States may or may not get some sort of interest in the land. Whatever that interest may be, however, it is *not* a fee simple. Otherwise, the statute is unconstitutional and void.

The whole case of the defendant here has been bottomed on the assumption that the United States had complete fee

ownership of plaintiffs' house and lands on September 1, 1959. This premise is obviously erroneous.

Three alternatives with relation to title may be considered in discussing the effect of the filing of a declaration of taking by the United States in a case where the landowners contest the validity of the condemnation.

1. Fee simple title. This is the contention of the Department of Justice in this case. The *Catlin* case, *supra*, holds squarely *contra*. (324 U.S. at p. 241.) That case states that whatever property right may be obtained by the United States, under no circumstances does a fee simple title vest in the United States. To hold that a fee simple vests in this case would render the Declaration of Taking statute invalid. (324 U.S. at p. 241.)

2. Defeasible title. This suggestion is made in the *Catlin* case, *supra*. (324 U.S. at p. 241.) But it is obvious from the context the Court was under the impression that this was the only alternative to holding that "title passes irrevocably" (324 U.S. at p. 241.)—i.e. fee simple title.

3. No property right whatever. This last result would accord with the canons of construction outlined previously. It avoids holding the statute unconstitutional which would have to be done if it were said that fee title were to vest. (324 U.S., at p. 241.) It is the stricter of the second and third alternatives. It has the support of language in the case law:

"A nullity, ineffective to vest title." *City of Oakland* v. *U.S.* 124 F. 2d 959, 963 (9th Cir. 1942), aff'g 37 F. sup. pp. 298, 300. See also the statement in the *Catlin* case, *supra*:

"We think the purpose was to leave intact the owner's remedy before the statute was adopted." 324 U.S., at p. 240.

It would seem that if the remedy has been left intact, certainly the owner's former property right, that of title, should also be left intact.

Plaintiffs' Motion for Reconsideration

Hence the United States had no fee title to plaintiffs' lands when Congress passed the Act of September 1, 1959 (Public Law 86-220, 73 Stat. 451) which empowered the Federal Aviation Agency to grant a right to a qualified grantee both to "dismantle" plaintiffs' home and "salvage and remove" its historic objects. That Act was an assertion of full dominion over plaintiffs' home and lands. The plaintiffs have shown that a proper interpretation of the Declaration of Taking statute is the United States had no property right in their lands on September 1, 1959. But even if the United States had a defeasible fee on that date, it would make no difference. Either no title or defeasible title are far different property from that complete ownership in fee which the United States, as well as anyone else, must have in order to exercise "unfettered power of disposition" (D. rep. br. p. 2).

It is clear that under the Act of September 1, 1959 (Public Law 86-220, 73 Stat. 451) Congress intended to take plaintiffs' home and lands in fee simple irrespective of whether or not the United States had previously acquired fee title, and having by that statute taken such full title, intended to dispose of the most vital part thereof, the mansion "Leeton", in a manner which would forever bar the plaintiffs from regaining it—namely demolition.

Thus the source of the taking authority here is the Act of September 1, 1959 (Public Law 86-220, 73 Stat. 451). Thereafter on January 14, 1960, (Pl. p. 6), the Federal Aviation Agency granted the "salvage rights" to the Fairfax Park Authority whose physical entry on the property on February 1, 1960, (Pl. p. 6), constituted the actual "taking" in this case.

This is a direct legislative taking. Under the Tucker Act, since the sum involved is over $10,000, only this Honorable Court has jurisdiction.

It is therefore respectfully requested that this Honorable Court reconsider its opinion of March 1, 1961, and having reconsidered, deny defendant's motion and grant plaintiffs' motion.

Respectfully submitted,

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Pro Se

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Attorney for Plaintiff
JEAN S. TRAVIS

IN THE UNITED STATES COURT OF CLAIMS

286-56	Josephine C. Rumley, Admx.	v. THE UNITED STATES
168-59	Socony Mobil Oil Co., Inc.	
169-59		
187-59		
188-59	Mississippi Shipping Co., Inc.	
442-59	Harvey S. Haislip	
218-60	Lewis S. Travis, et al.	

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof.

IT IS ORDERED this third day of May, 1961 that said motions be and the same are overruled as follows:

286-56 Josephine C. Rumley, Admx. Plaintiff's motion.
168-59, 169-59, 187-59 Socony Mobil Oil Co., Inc. Defendant's motion.
188-59 Mississippi Shipping Co., Inc. Defendant's motion.
442-59 Harvey S. Haislip. Plaintiff's motion.
218-60 Lewis S. Travis, et al. Plaintiff's motion.

BY THE COURT

MARVIN JONES
Chief Judge